81-2201

Office Supreme Court, U.S.
FILED
MAY 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81—

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD A. KEEFE,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT J. WEBER,
221 N. LaSalle Street,
Chicago, Illinois 60601,
(312) 782-1983,

*Counsel for Petitioner,*
*Richard A. Keefe.*

Keenan Printing Company 312-648-0050 365

## QUESTIONS PRESENTED

i —Whether HUD, after agreeing to a firm commitment to insure an applicant's loan, has an implied contract to give the applicant honest and fair consideration?

ii —Did the Court of Claims fail to recognize the contract between Sponsors and HUD and then improperly grant summary judgment?

iii —Did the Court of Claims commit procedural errors? Did the Court of Claims fail to view the pleadings in the light most favorable to the Sponsors? Did the Court of Claims fail to recognize existing factual disputes? Did the Court of Claims fail to consider relevant factors?

## INDEX TO PETITION


| | Page |
|---|---|
| Questions Presented | i |
| Table of Authorities | iii |
| Opinion Below | 2 |
| Parties Below | 2 |
| Jurisdiction | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 17 |
| Appendix | |
| A | |
| B | |
| C | |
| D | |


## TABLE OF AUTHORITIES


*Alsbury* v. *United States Postal Service*, 392 F. Supp. 71 (D.C. Cal. 1975) ..... 16

*American Federation of State, County and Municipal Employees, AFL-CIO, Greater Cleveland District Council 78* v. *City of Cleveland*, 484 F. 2d 339 (6th Cir. 1973) ..... 16

*Arrasmith* v. *Pennsylvania R. Co.*, 410 F. 2d 1311 (6th Cir. 1969) ..... 14

*Brown* v. *Lynn*, 392 F. Supp. 559 (D.C. Ill. 1975) ..... 12

*Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659 (6th Cir. 1972) ..... 15

*Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627 (1971) .....7, 10

*Coriolan* v. *Immigration and Naturalization Service*, 559 F. 2d 993 (5th Cir. 1977) ..... 15

| Cases | Page |
|---|---|
| *Crocker* v. *United States*, 127 F. Supp. 568, 130 Ct. Cl. 576 (1955) | 9 |
| *Garret* v. *F.C.C.*, 513 F. 2d 1056 (D.C. Cir. 1975) | 13 |
| *Heyer Products Company, Inc.* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956) | 6 |
| *Keco Industries, Inc.* v. *United States*, 428 F. 2d 1233, 192 Ct. Cl. 773 (1970) | 6 |
| *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200, —— Ct. Cl. —— (1974) | 8 |
| *Niagara Mohawk Power Corp.* v. *United States*, 525 F. 2d 1380, 207 Ct. Cl. 576 (1975) | 9, 14 |
| *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859 (U.S. App. D.C. 1970) | 6 |
| *Tree Farm Development Corporation* v. *United States*, 585 F. 2d 493, 218 Ct. Cl. 308 (1978) | 7 |
| *Xytex Corp.* v. *Schliemann*, 382 F. Supp. 50 (D.C. Colo. 1974) | 11 |

**Statutes**

| | |
|---|---|
| 12 U.S.C. § 1715k | 3 |
| 28 U.S.C. § 1255 | 2 |
| 28 U.S.C. § 2101 | 2 |

**Rules**

| | |
|---|---|
| Rule 20 of the Supreme Court Rules | 2 |

**Regulations**

| | |
|---|---|
| 24 C.F.R. § 200.145 | 16 |
| 24 C.F.R. § 200.147 | 4, 8 |
| 24 C.F.R. § 200.149 | 4, 8 |
| 24 C.F.R. § 207.251 | 3 |
| 24 C.F.R. § 207.254 | 3 |
| 24 C.F.R. § 220.618 | 12 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD A. KEEFE,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Richard A. Keefe, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims, entered in this proceeding on August 19, 1981.

## OPINION BELOW

The opinion of the Court of Claims appears in Appendix A hereto.

## PARTIES BELOW

The names of all parties to this petition appear in the caption of the case. Additional parties-plaintiff before the Court of Claims were Roy S. Diamond, Gerald Leavitt and Peter S. Zouvas.

## JURISDICTION

The judgment of the Court of Claims was entered on August 19, 1981. Petitioners' petition for rehearing was denied by the Court of Claims on December 30, 1981. By order of Chief Justice Warren E. Burger, dated April 15, 1982, petitioner's time for filing this petition for Writ of Certiorari was extended to May 29, 1982. This petition is timely filed pursuant to Rule 20 of the Supreme Court Rules and 28 U.S.C. § 2101(c). This court's jurisdiction is invoked under 28 U.S.C. § 1255.

## STATEMENT OF THE CASE

Plaintiffs ("Sponsors") were sponsors of and investors in a proposed multifamily housing project in Chicago, Illinois. The project, identified as LaSalle-Oak Apartments, FHA Project No. 017-32070 PM, was to consist of 1,386 apartment units costing approximately $47 million. It was to be financed by secured loans of approximately $40 mil-

lion. Plaintiffs and their lender sought a commitment from the United States Department of Housing and Urban Development ("Hud") for full insurance of this loan under Section 220 of the National Housing Act of 1934, 12 U.S.C. § 1715k.

Sponsors claim that HUD engaged in arbitrary, capricious and unlawful behavior in its processing of the project's application for FHA mortgage insurance. The project, which progressed to the firm commitment stage, never proceeded to initial endorsement and was terminated by HUD-Chicago. HUD-Chicago claims that the Sponsors failed to meet certain regulatory and statutory requirements. The Sponsors answer that the conditions that were imposed upon them by HUD-Chicago were unlawful, arbitrary, discriminatory and capriciously determined.

The first step in obtaining federal mortgage insurance is the pre-application stage where the proposal is examined by HUD to find out whether a project would be economically feasible by production of sufficient income to pay operating and fixed project expenses, meet the mortgage requirements, and leave a fair net return to the developer.

If the project is found to be economically feasible, the developer and lender may apply for a commitment for project mortgage insurance. At this point, the developer must submit the proposal in more complete detail. If the commitment is forthcoming, there may be an endorsement of the mortgage note for the insurance. 24 C.F.R. § 207.251(e). This "initial" endorsement binds HUD to insure amounts advanced by the lender during the construction phase. 24 C.F.R. § 207.254(a). A second and "final" endorsement takes place when the project is completed and the final total insurable mortgage amount can be determined. 24 C.F.R. § 207.254(b) and (c).

If a commitment is given, HUD is required to endorse the mortgage both initially and finally, provided various conditions have been met as set forth in the commitment. If those conditions are not met, the commitment expires on a fixed date.

In this case, the HUD office in Chicago ("HUD-Chicago"); through John Waner, Director, Chicago Area Office, ("the Director") on April 18, 1973, issued a firm commitment which was amended on July 9, 1974. By reason of this firm commitment, there was a legal relationship between the parties, 24 C.F.R. § 200.147, whereby HUD was legally bound to endorse the mortgage for insurance once the conditions were met. 24 C.F.R. § 200.149(b). As a condition to be met after firm commitment, but *prior to initial endorsement,* the Sponsors were to deposit $1,608,600.00, later amended to $1,962,630.00, as an initial operating deficit ("IOD"). The purpose of the IOD is to cover the expenses of the project from the date of initial occupancy until twelve months[1] after the date of the final endorsement. At the discretion of the Commissioner, the requirement for and the amount of the IOD is established.

When the conditions of the commitment were made known, the Sponsors questioned the Commissioner's estimated IOD and sought disclosure of the basis upon which the decision was made. HUD-Chicago responded by providing the Sponsors with an incomplete statistical computation based upon four other high rise projects in Chicago.

The Sponsors then provided HUD-Chicago with a report ("the FHA Report") of seventeen FHA projects (See Appendix P). Included in the FHA Report was the

---

1. There was a change to twenty-four months in the amended IOD.

Carl Sandburg project that was located two blocks north of the Sponsors' site and consisted of more than 1,444 dwelling units. HUD-Chicago did not require the Sandburg Sponsors to post an IOD.

In January, 1975, HUD-Chicago refused to extend the firm commitment. Accordingly, the commitment expired. Sponsors appealed the expiration through the proper channels to the HUD Washington Office ("HUD-Washington"). In their appeal, the Sponsors asked HUD-Washington to investigate how their commitment was processed, with particular regard to the IOD.

The subsequent HUD-Washington investigation resulted in a report authored by Edward Winiarski of the Multi Family Valuation Branch of HUD (See Appendix C). In his report, Winiarski concludes "the processing (by Chicago-HUD) did not properly address a number of factors considered most relevant." He lists eight points and says that "without clarification of these points, it is impossible to adequately evaluate whether the $1,962,630.00 IOD is plausible." Relying upon Winiarski's report, HUD-Washington recommended that HUD-Chicago reopen and completely reprocess the commitment.

In April, HUD-Chicago reopened the commitment for reprocessing and during April, May, and June, 1975, the Sponsors resubmitted all documents to HUD-Chicago. On October 30, 1975 the Chicago Office demanded that four new conditions be met *prior to the reprocessing*. The conditions were:

1. additional fees for an increase in the insured mortgage amount;
2. evidence of construction and permanent financing rates, discounts, fees and source;
3. signed Owner Architects Agreement; and
4. complete contract drawings.

Meeting these conditions would require the expenditure of several hundred thousand dollars and would take at least ninety days. They had not been required of the Sponsors in the first processing and were not required of other projects in Chicago. Items two, three and four are conditions that must be fulfilled *after* commitment and *prior* to initial endorsement. HUD-Chicago was making these a condition of reprocessing.

On November 25, 1975 the Chicago Office informed the Sponsors that they had ten days to complete the requirements and, on December 8, 1975, terminated the commitment.

## REASONS FOR GRANTING THE WRIT

### I.

### HUD HAS AN IMPLIED CONTRACT TO HONESTLY AND FAIRLY DEAL WITH THE SPONSORS AND PROCESS THEIR PROJECT.

In *Heyer Products Company, Inc.* v. *United States,* 140 F. Supp. 409, 135 Ct. Cl. 63 (1956), the court found that every bidder has the right to have his bid honestly considered by the government, and if this obligation is breached, the injured party has the right to prove his cause of action in court. This cause of action was created so that there would be "some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests." *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F. 2d 859 (U.S. App. D.C. 1970). The holding in *Scanwell* is broad enough to grant standing to a party seeking personal money damages. *Keco Industries, Inc.* v. *United States,* 428 F. 2d 1233, 192 Ct. Cl. 773 (1970).

These line of cases require the government to interprete and apply regulations fairly and honestly and treat all bidders without discrimination. *Keco*, supra. These decisions are in line with the intent of Congress to "favor review for those who are likely to be injured by illegal agency action in the context of government contracting." *Scanwell*, supra, at p. 867. Courts are reluctant to limit the *Heyer* rule, as expanded by *Keco*, because of the public interest in preventing arbitrary and capricious governmental action. *Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627 (1971).

The plaintiff in *Tree Farm Development Corporation* v. *United States*, 585 F. 2d 493, 218 Ct. Cl. 308 (1978) sought to have the "honest and fair consideration" rule of *Heyer* expanded to a loan application situation. In *Tree Farm*, a developer brought suit against the United States seeking damages because, while its application for loan guarantees was being processed by HUD, the HUD Secretary had decided to cancel the loan program. The court found that HUD merely invited *Tree Farm* to submit an application and that HUD was never legally bound with the plaintiff. In fact, the applicant in *Tree Farm* was advised that the willingness to consider the application did not indicate the probable disposition thereof. The court dismissed *Tree Farm* for lack of jurisdiction when no implied contract was found.

In this case, the Court of Claims found that the Sponsors did not have a contract implied in fact and cited *Tree Farm* as the basis for their decision. The court erred in applying *Tree Farm* to the present case.

The plaintiff in *Tree Farm* was a loan guarantee applicant. There was no contractual relationship between the

applicant and the government and there was no evidence of arbitrary and capricious conduct by the government. The allegations, viewed most favorably for the plaintiff, established that *Tree Farm's* application received an evenhanded treatment by the government.

In the present case, the Sponsors were well beyond the application stage or invitation stage. They had been issued a firm commitment, which is a legally binding relationship 24 C.F.R. § 200.147 in that HUD was bound to endorse the mortgage insurance once all conditions were met. 24 C.F.R. § 200.149(b). The facts alleged viewed most favorably for the Sponsors, show that HUD was arbitrary and capricious in the processing of the firm commitment and unlawfully and discriminatorily set up conditions that would eventually force the commitment to expire. At the very least, a factual issue is created. The Sponsors firm commitment was not given an evenhanded treatment by HUD.

The fact that the Sponsors were not just applicants, but were in a legal relationship with HUD; and that there is evidence of arbitrary and capricious conduct distinguish this case from *Tree Farm*. *Tree Farm* should not be the rationale for denying the Sponsors' claim, but should have been the basis for conducting a factual hearing.

The question still remains whether the doctrine of fair and honest consideration of bids in procument situation should be extended to the present fact situation. In *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974) ("Keco II"), the court articulated four general criteria controlling these claims: 1) subjective bad faith on the part of the procuring officials that deprives a bidder of the fair and honest consideration of his proposal; 2) that there was no reasonable basis for the administrative decision; 3) that the degree of proof of error necessary for

recovery is ordinarily related to the amount of discretion entrusted to the officials; and 4) that proven violation of pertinent statutes or regulations can be a ground for recovery.

The present case falls within the perimeters of the *Keco II* criteria. In addition, it conforms with the rationale that led to the *Heyer* rule. The Sponsors expended large sums of money to have their firm commitment processed and they had a right to expect the government to be fair and honest in its conduct while processing. By imposing arbitrary, capricious and unlawful conditions upon the Sponsors, HUD violated the implied contract.

Where discretion is conferred upon an administrative officer to render a decision, this decision must be honestly rendered, and if arbitrary or capricious or rendered in bad faith, the courts have power to review the decision and set it aside. *Crocker* v. *United States,* 127 F. Supp. 568, 130 Ct. Cl. 576 (1955). This standard should be applied to the present case.

This Court's review is necessary to provide the Sponsors with an adequate remedy and to fix the obligation of the governmental agencies in loan guarantee situations where a loan commitment has been issued.

## II.

## THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MATERIAL ISSUES OF FACT EXIST.

If there are disputed, material factual issues which must first be resolved on the merits, a motion for summary judgment cannot be granted. *Niagara Mohawk Power Corp.* v. *U.S.,* 525 F. 2d 1380, 207 Ct. Cl. 576 (1975). In this case,

it is disputed whether the conditions precedent to endorsement of mortgage insurance and reprocessing of a firm commitment were arbitrarily and capriciously determined and unlawfully applied. On this alone, summary judgment should not have been granted.

## A.

### The Court Erred In Granting The Motion Of The Government For Summary Judgment Because There Exists More Than An Inference That The Actions Of HUD Were Arbitrary And Capricious.

On the government's motion for summary judgment, the Court of Claims must determine whether there are factual disputes which raise a sufficient inference of arbitrary and capricious action by the government to warrant a trial on the merits. *Continental Business Enterprises* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627 (1971). The pleadings, together with the exhibits submitted by the parties, disclose blatant examples of HUD's unlawful and discriminatory behavior. In processing the Sponsors' application, HUD-Chicago abused its discretion in requiring the following items:

1) an IOD of $1,962,630.00 in cash;
2) additional application fees in the approximate amount of $31,000 to be paid *prior to reprocessing;*
3) evidence of construction and permanent financing rates *prior to reprocessing;*
4) signed Owner-Architect Agreement *prior to reprocessing;* and
5) complete contract drawings prior to *reprocessing.*

It is not disputed that it is within HUD's discretion to determine the amount, if any, of an IOD deposit. However,

in this case both the requirement for and the prohibitive high amount of the IOD constitute an abuse of discretion. When the Sponsors questioned HUD-Chicago regarding the IOD, HUD-Chicago presented them with a survey of four high rise projects that HUD-Chicago deemed comparable. The Sponsors demonstrated that the four projects relied upon by HUD-Chicago were not comparable to the LaSalle-Oak project in size, type or location, and then presented their own comparative analysis of seventeen high rise projects in the area that were insured by HUD. (Appendix C). The Sponsors' study shows that: 1) the IOD requirement for the Sponsors was more than the total required by all 17 comparable units; (See Appendix C); 2) the usual HUD-Chicago practice was not to require an IOD deposit (12 of 17 had a $0.00 requirement); (See Appendix C); and 3) if an IOD was required, the average amount was approximately $500.00 per dwelling unit (the Sponsors were required to deposit $1,422.00 per dwelling unit). (See Appendix C).

It is abuse of discretion for an administrative agency to act without collecting the necessary facts. *Xytex Corp.* v. *Schliemann*, 382 F. Supp. 50 (D.C. Colo. 1974). In this case, HUD-Chicago required an IOD in excess of $1.9 million dollars without conducting a survey and evaluation of relevant factors.

The proof of this abuse is the reaction of HUD-Washington. When the Sponsors appealed the IOD requirement to HUD-Washington, the Winiarski Report (see Appendix D) was authored. In this report, Mr. Winiarski of HUD specifically set out the deficiencies in the HUD-Chicago IOD determination and found that it was impossible to adequately evaluate the IOD amount based on the incomplete study by HUD-Chicago.

Because of the HUD-Washington report, the Sponsors obtained permission from HUD-Washington to have HUD-Chicago reopen and reprocess their firm commitment. It is within this reprocessing step from April, 1975, to December, 1975, that HUD-Chicago became most blatant in its arbitrary, capricious and unlawful conduct.

Before it would begin reprocessing, HUD-Chicago required the Sponsors to submit a signed Owner Architect Agreement. However, it is clearly stated in the firm commitment contract that an Owner Architect agreement is a requirement to be met at the time of initial endorsement and not when reprocessing a firm commitment.

Before it would reprocess HUD-Chicago also demanded evidence of construction and permanent financing rates. This, too, is a requirement to be met prior to initial endorsement—not prior to reprocessing a firm commitment. 24 C.F.R. § 220.618(a). Furthermore, in the financial climate of 1975, it was impossible to know what the permanent rates would be from the time of reprocessing until an unknown time of initial endorsement.

Before it would reprocess, HUD-Chicago demanded complete contract drawings from the Sponsors. The commitment contract does require working drawings, but nowhere specifies that they must be complete. Even if they were to be complete, they were to be completed *during* the commitment stage and not prior to reprocessing. HUD alleges that complete drawings are required at this step, and cites the HUD handbook. However, recommendations in the HUD handbook are not legally binding regulations. *Brown* v. *Lynn*, 392 F. Supp. 559 (D.C. Ill. 1975). In fact, complete working drawings were not required by HUD-Chicago until just prior to initial endorsement of the note.

Even if the Sponsors were to complete the contract drawings, they were not given adequate time. HUD-Chicago gave the Sponsors a little over a month to complete a task that would take at least ninety days and over a $100,000. HUD-Chicago was arbitrary and capricious in its unreasonable time requirement for such a task.

Before it would reprocess, HUD-Chicago required the Sponsors to pay an additional fee of approximately $31,000 for the proposed increase in the mortgage amount. The Sponsors do not claim that HUD abused its discretion in requiring the fee. In previous mortgage increase dealings with the Sponsors, HUD-Chicago and the Sponsors would renegotiate all amounts that were to make up the revised commitment and then the Sponsors would pay the additional fees according to the final approved adjusted figures. In requiring the fee before renegotiation, HUD-Chicago violated its past procedures, which were standard and usual in Chicago. Herein, lies the abuse.

Agency action cannot stand when it is so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion. *Garret* v. *F.C.C.*, 513 F. 2d 1056 (D.C. Cir. 1975). In setting an unusually high IOD and requiring conditions that should not to be imposed at the reprocessing step, HUD-Chicago broke from its customary procedures. The Sponsors had been issued a firm, and amended firm commitment without being required to complete contract drawings, present an Owner Architect Agreement or show evidence of firm financing rates. By requiring these conditions prior to reprocessing the commitment, HUD-Chicago varied the procedures used not only in dealing with the Sponsors, but with all other Chicago projects.

There are disputed, material factual issues which should have been resolved on the merits. Therefore, summary judgment should not have been granted. *Niagara Mohawk Power Corp.* v. *U.S.*, 525 F. 2d 1380, 207 Ct. Cl. 576 (1975).

**B.**

**The Court Made Procedural Errors In Determining That HUD's Conduct Was Not Arbitrary Or Capricious.**

On motion for summary judgment, evidence is to be construed most favorably toward the non-movant. *Arrasmith* v. *Pennsylvania R. Co.*, 410 F. 2d 1311 (6th Cir. 1969). It is clear from reading the opinion of the court below that it construed all facts in a light most favorable to the movant-HUD.

The court below adapted HUD's excuses for HUD's unreasonable conduct when the court said that the Sponsors had difficulty with their financing, had tentative commitments with their lenders and, in general, were an unstable operation. These factual conclusions are untrue and because there was no evidentiary hearing, could only result from the court below construing the facts in the light most favorable to the government.

The court below goes further by stating that HUD did not take the imposed requirements lightly; and that HUD was concerned with a negative cash flow during the first few years. Hence, the IOD was based upon a reasonable assumption by HUD. As demonstrated above, with regard to the IOD, the court not only failed to view the evidence most favorably for the Sponsors, but failed to view the Sponsors' evidence at all.

The court below even misapprehends the Sponsors' case. The court states that the Sponsors' central complaint was

that they were not on notice that substantial sums of money would be required at closing and that the four disputed conditions prior to reprocessing are peripheral to the central complaint. This is not so. The Sponsors' central complaint is that the setting of an unusually high IOD amount and requiring the four conditions prior to reprocessing was abusive, capricious and discriminatory conduct by HUD-Chicago.

The court below also says that the Sponsors do not allege a violation of HUD regulations. This, too, is incorrect. The Sponsors' petition clearly alleges violations by HUD of their own regulations. Because the court did not have a clear understanding of the facts of the case, they could not make a correct determination on a motion for summary judgment.

In determining arbitrary and capricious conduct, the reviewing court must consider whether the decision was based on a consideration of all relevant factors. *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659 (6th Cir. 1972). This involves an inquiry into the facts. Evaluation of an agency's treatment of the evidence is part of the discretionary review. *Coriolan* v. *Immigration and Naturalization Service*, 559 F. 2d 993 (5th Cir. 1977).

The court below did not consider all relevant factors when deciding the motion for summary judgment in that they did not evaluate how HUD made its decisions or treated the evidence during discretionary review.

The court only looked to the commitment, saw that an IOD was required, and acknowledged that the Sponsors did not deposit the amount. The court found the IOD to be based upon "a reasonable assumption" that a negative cash flow would occur from the project. This "reasonable assumption" is not based upon evidence, but the argumen-

tative conclusions of HUD. By accepting these HUD conclusions, the court failed to look at *any* evidence regarding how the IOD was determined, and thus failed to address one of the main issues of the Sponsors' case.

During the underwriting process, HUD is required to report its findings and recommendations that become the basis of commitment. 24 C.F.R. § 200.145(b). This report, the Sponsors' IOD Comparative analysis and the HUD-Washington report should all have been reviewed by the court below. It is obvious that they did not consider this evidence of disputed issues or summary judgment would have never been granted.

The court further states that the "key to resolution of this dispute is the formal commitment itself". If the court had read the entire document it would have seen that the Owner Architect Agreement and financing information was only required prior to initial endorsement. This would have ended the dispute on these issues for it clearly shows that HUD-Chicago violated its own procedure.

In reviewing exercise of discretion by an administrative agency, the court must determine whether the agency acted within its scope of authority; whether the decision was arbitrary, capricious, an abuse of discretion or otherwise in accordance with law and whether the necessary procedural requirements were observed by the agency. *American Federation of State, County and Municipal Emp., AFL-CIO, Greater Cleveland Dist. Council 78* v. *City of Cleveland,* 484 F. 2d 339 (9th Cir. 1973). However, the trend has been to enlarge the test to require a judicial finding that the agency's factual determinations were and are supported by substantial evidence. *Alsbury* v. *United States Postal Service,* 392 F. Supp. 71 (D. Cal. 1975).

The court of claims then, erred by not viewing the evidence, being the pleadings and exhibits, in the proper light, misapprehended the case of the Sponsors, and failed to consider all relevant factors pertaining to the decision confronting it. For these reasons, a review is necessary to prevent further administrative indiscretion and provide the Sponsors with an equitable remedy.

## CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

ROBERT J. WEBER,
221 N. LaSalle Street,
Chicago, Illinois 60601,
(312) 782-1983,

*Counsel for Petitioner,*
*Richard A. Keefe.*

May, 1982